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In The

Supreme Court of the United States

October Term, 1979

No. 79-1438

HAROLD LAMONT OTEY,

Petitioner,

vs.

THE STATE OF NEBRASKA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

—o—

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Nebraska entered December 18, 1979.

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OPINION BELOW

The opinion of the Supreme Court of the State of Nebraska in the case of Harold Lamont Otey is reported at 205 Neb. 90, 287 N.W. 2d 36 (1979), attached hereto

as Appendix A. Also included in the appendix is the case of *State v. Williams,* 205 Neb. 56, 287 N. W. 2d 18 (1979), attached as Appendix B, which opinion is incorporated by reference in the opinion of the Petitioner.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3), Petitioner having asserted below and is asserting here a deprivation of his rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Do the Nebraska Death Penalty Statutes violate the Eighth and Fourteenth Amendments to the Constitution of the United States in that they result in the discriminatory imposition of the Death Penalty?

2. Do the Eighth and Fourteenth Amendments to the Constitution of the United States require states choosing to selectively impose the death penalty to provide for meaningful appellate review of the uniformity of such imposition?

3. Does the Nebraska death penalty statute violate the Eighth and Fourteenth Amendments to the Constitution of the United States in that it fails to provide meaningful review of the facts and circumstances surrounding

the imposition of the death penalty as compared to the imposition of a sentence of life imprisonment?

4. Does the Nebraska Death Penalty violate the Sixth Amendment to the Constitution of the United States in that it fails to provide persons sentenced to death with adequate information concerning the circumstances surrounding other homicides, thus denying such persons the effective assistance of counsel?

5. Did the Nebraska Supreme Court violate the Sixth Amendment to the Constitution of the United States in that it failed to grant petitioner's request for a continuance, thereby denying him effective assistance of counsel?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the provisions of Nebraska law as follows:

> Neb. Rev. Stat. 1943 § 28-401. *Murder in the first degree, defined; penalty.* Whoever shall purposely and of deliberate premeditated malice or in the perpetration of or attempt to perpetrate any sexual assault in the first degree, arson, robbery, kidnapping, hijacking of any public or private means of transportation, or burglary, or by administering poison, or causing the same to be done, kill another; or, whoever by willful and corrupt perjury or subornation of the same, shall purposely procure the

conviction and execution of any innocent person, every person so offending shall be deemed guilty of murder in the first degree, and upon conviction thereof shall suffer death or shall be imprisoned in the Nebraska Penal and Correctional Complex during life. The punishment shall be determined and fixed in the manner provided by sections 29-2520 to 29-2524.

Neb. Rev. Stat. 1943 § 29-2519. *Statement of Intent.* The Legislature hereby finds that it is reasonable and necessary to establish mandatory standards for the imposition of the sentence of death; that the imposition of the death penalty in every instance of the commission of the crimes specified in section 28-401 fails to allow for mitigating factors which may dictate against the penalty of death; and that the rational imposition of the death sentence requires the establishment of specific legislative guidelines to be applied in individual cases by the court. The Legislature therefore determines that the death penalty should be imposed only for the crimes set forth in section 28-401 and, in addition, that it shall only be imposed in those instances when the aggravating circumstances existing in connection with the crime outweigh the mitigating circumstances, as set forth in sections 29-2520 to 29-2524.

Neb. Rev. Stat. 1943 § 29-2520. *Murder; person found guilty; sentence; determination.* Whenever any person is found guilty of a violation of section 28-401, the district court shall within seven days fix a date for hearing on determination of the sentence to be imposed. Such determination shall be made by: (1) the judge who presided at the trial or who accepted the plea of guilty; (2) a panel of three judges including the judge who presided or accepted the plea, the two additional judges having been designated by the Chief Justice of the Supreme Court after receiving a request therefor from the presiding judge; or (3) a panel of three district judges named by the

Chief Justice of the Supreme Court when such Chief Justice has determined that the presiding judge is disabled or disqualified after receiving a suggestion of such disability or disqualification from the clerk of the court in which the finding of guilty was entered.

Neb. Rev. Stat. 1943 § 29-2521. *Determination of sentence; procedure.* In the proceeding for determination of sentence, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances set forth in section 29-2523. Any such evidence which the court deems to have probative value may be received. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death. The court shall set forth the general order of procedure at the outset of the sentence determination proceeding.

Neb. Rev. Stat. 1943 § 29-2522. *Sentence; death; life imprisonment; determination of death in writing.* After hearing all of the evidence and arguments in the sentencing proceeding, the judge or judges shall fix the sentence at either death or life imprisonment, but such determination shall be based upon the following considerations:

(1) Whether sufficient aggravating circumstances exist to justify imposition of a sentence of death; or

(2) Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be in writing and shall be supported by written findings of fact based upon the records of the trial and the sentencing proceeding, and referring to the aggravat-

ing and mitigating circumstances involved in its determination.

Neb. Rev. Stat. 1943 § 29-2523. *Aggravating and mitigating circumstances, defined.* The aggravating and mitigating circumstances referred to in sections 29-2521 and 29-2522 shall be as follows:

(1) Aggravating Circumstances:

(a) The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity;

(b) The murder was committed in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime;

(c) The murder was committed for hire, or for pecuniary gain, or the defendant hired another to commit the murder for the defendant;

(d) The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence;

(e) At the time the murder was committed, the offender also committed another murder;

(f) The offender knowingly created a great risk of death to at least several persons;

(g) The victim was a law enforcement officer or a public servant having custody of the offender or another; or

(h) The crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws.

(2) Mitigating Circumstances:

(a) The offender has no significant history of prior criminal activity;

(b) The offender acted under unusual pressures or influences or under the domination of another person;

(c) The crime was committed while the offender was under the influence of extreme mental or emotional disturbance;

(d) The age of the defendant at the time of the crime;

(e) The offender was an accomplice in the crime committed by another person and his participation was relatively minor;

(f) The victim was a participant in the defendant's conduct or consented to the act; or

(g) At the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication.

Neb. Rev. Stat. 1943 § 29-2524. *Existing procedures; act does not repeal.* Nothing in sections 24-342, 28-401, 28-417, and 29-2519 to 29-2546 shall be in any way deemed to repeal or limit existing procedures for automatic review of capital cases, nor shall it in any way limit the right of the Supreme Court to reduce a sentence of death to a sentence of life imprisonment in accordance with the provisions of section 29-2308, nor shall it limit the right of the Board of Pardons to commute any sentence of death to a sentence of life imprisonment.

Neb. Rev. Stat. 1943 § 29-2525. *Punishment is capital; appeal; clerk of district court; transcript; prepare; file; no charge; Clerk of Supreme Court; writ or error; issue.* In cases when the punishment is capital, no petition in error shall be required and within the time prescribed by section 25-1931 for the commencement of proceedings for the reversing, vacat-

ing, or modifying of judgments, the clerk of the district court in which the conviction was had shall prepare and file with the Clerk of the Supreme Court a transcript of the record of the proceedings, for which no charge shall be made. The Clerk of the Supreme Court shall, upon receipt of the transcript, issue a writ of error. Such writ shall be returnable before the Supreme Court and the payment of a docket fee shall not be required.

Neb. Rev. Stat. 1943 § 29-2528. *Conviction; punishment is capital; writ of error; suspension of execution; hearing.* In all cases of conviction when the punishment shall be capital, the judges or court shall allow such writ of error as a matter of right, and shall order a suspension of the execution until such writ of error shall be heard and determined. Upon hearing such writ of error, it shall order the prisoner to be discharged, a new trial to be had, as the nature of the case may require.

Neb. Rev. Stat. 1943 § 29-2521.01. *Legislative findings.* The Legislature hereby finds that:

(1) Life is the most valuable possession of a human being, and before taking it, the state should apply and follow the most scrupulous standards of fairness and uniformity;

(2) The death penalty, because of its enormity and finality, should never be imposed arbitrarily nor as a result of local prejudice or public hysteria;

(3) State law should be applied uniformly throughout the state and since the death penalty is a statewide law an offense which would not result in a death sentence in one portion of the state should not result in death in a different portion;

(4) Charges resulting from the same or similar circumstances have, in the past, not been uniform and have produced radically differing results; and

(5) In order to compensate for the lack of uniformity in charges which are filed as a result of similar circumstances it is necessary for the Supreme Court to review and analyze all criminal homicides committed under the existing law in order to insure that each case produces a result similar to that arrived at in other cases with the same or similar circumstances.

Neb. Rev. Stat. 1943 § 29-2521.02. *Criminal homicide cases; review and analysis by Supreme Court; manner.* The Supreme Court shall within a reasonable time after July 22, 1978, review and analyze all cases involving criminal homicide committed on or after April 20, 1973. Such review and analysis shall examine (1) the facts including mitigating and aggravating circumstances, (2) the charges filed, (3) the crime for which defendant was convicted, and (4) the sentence imposed. Such review shall be updated as new criminal homicide cases occur.

Neb. Rev. Stat. 1943 § 29-2521.03. *Criminal homicide cases; appeal; sentence; Supreme Court review.* The Supreme Court shall, upon appeal, determine the propriety of the sentence in each case involving a criminal homicide by comparing such case with previous cases involving the same or similar circumstances. The Supreme Court may reduce any sentence which it finds not to be consistent with sections 29-2521.01 to 29-2521.04, 29-2522, and 29-2524.

Neb. Rev. Stat. 1943 § 29-2521.04. *Criminal homicide cases; Supreme Court review and analyze; district court; provide records.* Each district court shall provide all records required by the Supreme Court in order to conduct its review and analysis pursuant to sections 29-2521.01 to 29-2521.04, 29-2522, and 29-2524.

Neb. Rev. Stat. 1943 § 29-2522. *Sentence; death; life imprisonment; determination of death in writing.* After hearing all of the evidence and arguments in the sentencing proceeding, the judge or judges shall fix

the sentence at either death or life imprisonment, but such determination shall be based upon the following considerations:

(1) Whether sufficient aggravating circumstances exist to justify imposition of a sentence of death;

(2) Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

In each case in which the court imposes the death sentence, the determination of the court shall be in writing and shall be supported by written findings of fact based upon the records of the trial and the sentencing proceeding, and referring to the aggravating and mitigating circumstances involved in its determination.

Neb. Rev. Stat. 1943 § 29-2524. *Existing procedures; act does not repeal.* Nothing in sections 24-342, 28-303, 28-313, 29-2519 to 29-2546 and sections 29-2521.01 to 29-2521.04 shall be in any way deemed to repeal or limit existing procedures for automatic review of capital cases, nor shall it in any way limit the right of the Supreme Court to reduce a sentence of death to a sentence of life imprisonment in accordance with the provisions of section 29-2308, nor shall it limit the right of the Board of Pardons to commute any sentence of death to a sentence of life imprisonment.

Neb. Rev. Stat. 1943 § 29-2524.01. *Criminal homicide; report filed by county attorney; contents.* Each county attorney shall file a report with the State Court Administrator for each criminal homicide case filed by him. The report shall include (1) the initial charge filed, (2) any reduction in the initial charge and whether such reduction was the result of a plea bargain or some other reason, (3) dismissals prior to

trial, (4) outcome of the trial including not guilty, guilty as charged, guilty of a lesser included offense, or dismissal, (5) the sentence imposed, (6) whether an appeal was taken, and (7) such other information as may be required by the State Court Administrator. Such report shall be filed not later than thirty days after ultimate disposition of the case by the court.

Neb. Rev. Stat. 1943 § 29-2524.02. *State Court Administrator; criminal homicide report; provide forms.* The State Court Administrator shall provide all forms necessary to carry out sections 29-2524.01 and 29-2524.02.

STATEMENT OF THE CASE

Harold Lamont Otey was convicted of murder in the first degree in connection with the June, 1977, death of Jane McManus.

Following his conviction, the trial judge convened a three judge sentencing panel pursuant to Section 29-2520 of the Nebraska Statutes. This panel sentenced petitioner, Otey, to death, finding the presence of two aggravating circumstances included in Section 29-2523 (29-2523 (b) & (d)), and finding no mitigating circumstances.

Timely motions for new trial were filed by Simon J. Albracht, appointed by the district judge to prosecute petitioner's appeals.

An appeal was had to the Nebraska Supreme Court pursuant to Section 29-2525. Petitioner in part assigned as error the failure of the Court below to grant a continuance, as well as the unconstitutionality of the Nebraska

Death Penalty statutes under the United States and Nebraska Constitutions.

On December 18, 1979, the Nebraska Supreme Court affirmed petitioner's conviction and death sentence (Krivosha, C. J., dissenting) upholding the constitutionality of the Nebraska Death Penalty Statute.

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REASONS FOR GRANTING THE WRIT

Introduction

In 1972, this Court struck down the capital punishment statutes in all jurisdictions, stating:

> "The imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Furman v. Georgia,* 408 U. S. 238 (1972).

The primary fault in those statutes was the potential for discriminatory or "lightning-like" imposition of the death penalty. Since no apparent basis existed for determining which convicted accused would live and which die, those statutes failed to provide equal protection. Further, the random quality of the death penalty's imposition constituted cruel and unusual punishment.

Many states, including Nebraska, responded to *Furman* by enacting capital sentencing legislation which attempted to set objective standards for the imposition of the death penalty, for the most part by defining certain factual circumstances which aggravated the magnitude of the crime.

This Court upheld such statutory attempts to curb the random quality of death imposition in *Gregg v. Georgia,* 428 U. S. 153 (1976), *Proffitt v. Florida,* 428 U. S. 242 (1976), and *Jurak v. Texas,* 428 U. S. 262 (1976), while striking down statutory schemes which made the death sentence mandatory upon conviction of certain prescribed crimes. See *Woodson v. North Carolina,* 428 U. S. 280 (1976).

As an important element of these statutory schemes, this Court noted in *Gregg v. Georgia* that:

> "As an important additional safeguard against arbitrariness and caprice, the Georgia statutory scheme [required the Court to determine] whether the sentence is disproportionate compared to those sentences imposed in similar cases." *Gregg v. Georgia,* 428 U. S. at 198.

The legislation enacted by Nebraska in 1973 did not provide for appellate comparative review in death cases. However, in 1977, the legislature amended the death penalty statutes so as to require that both the sentencing judge or three judge panel (29-2522 (3)) and the Supreme Court (29-2521.03) consider the propriety of the sentence when compared to similar cases.

Petitioner contends that notwithstanding the fact that *Gregg v. Georgia* upheld the validity of selective death penalty legislation, important Constitutional questions remain concerning the provisions of such legislation. Chief among those questions are those raised by the present case, i. e., the vague and indefinite controls on the *actual* sentencing authority, and the manner of comparative appellate review. Petitioner seeks the opportunity to show that the Nebraska legislation is deficient in both areas.

I. The Nebraska Death Penalty Statutes violate the Eighth and Fourteenth Amendments in that they result in an arbitrary, capricious and discriminatory imposition of the death sentence.

A. The death sentence constitutes cruel and unusual punishment because the aggravating and mitigating circumstances are vague and indefinite.

The test for unconstitutional vagueness has been well articulated and recognized as an aspect of due process. "A vague law impermissibly delegates basic policy matters to . . . judges . . . for resolution on an ad hoc and subjective basis with the attendant dangers for arbitrary and discriminatory application." *Graynerd v. City of Rockford,* 408 U. S. 104, 109 (1971). "Men of common intelligence must not be forced to guess at the meaning." *Connelly v. General Construction Company,* 299 U. S. 385 (1926). It is incumbent upon the legislature to set clear guidelines for the trier of fact.

Section 29-2523 contains numerous terms about which reasonable men must guess at a meaning: specifically, 29-2523 "substantial"; 29-2523 (1) (c) "pecuniary gain"; 29-2523 (1) (d) "heinous, atrocious"; 29-2523 (2) (a) "significant history"; 29-2523 (2) (b) "emotional disturbance"; 29-2523 (2) (d) "age." No legislative guidance is given for any of these terms and men of common intelligence can and do guess at their meaning.

In *Gregg v. Georgia,* 428 U. S. 153 (1976), this Court held:

> "A system could have standards so vague that they would fail adequately to channel the sentencing decisions and patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur." 96 S. Ct. at 2935, fn. 46.

In *State v. White,* — Del. — (1978), the Delaware Supreme Court held as follows:

> "As has been demonstrated by *Gregg, Proffitt,* and *Jurek,* the constitutionality of a death penalty statute rests upon the premise that the sentencing authority's discretion in imposing the death penalty is guided and channeled by clear and objective statutory standards. The defendants assert that the aggravating circumstances which are designated in our Statute simply as 'elderly' and 'defenseless' victims, without further definition, are unconstitutionally broad and vague; that those aggravating circumstances do not provide adequate guidelines to channel the discretion of the sentencing authority sufficiently to constitute the clear and objective statutory standard mandated by *Gregg* and its companion cases. We agree.
>
> "The problem and the answer were well stated by the Supreme Court of Georgia in ruling an aggravating circumstance in its death penalty statute as being unconstitutionally vague in *Arnold v. State,* Ga. Super., 224 S. E. 2d 386, 391 (1976):
>
> > 'Whenever a statute leaves too much room for personal whim and subjective decision-making without a readily ascertainable standard or minimal, objective guidelines for its application, it cannot withstand constitutional scrutiny.'"

The requirement of objective standards to guide the sentencing process is made clear in *Woodson v. North Carolina,* 428 U. S. 280, 303 (1976). By contrast, § 29-2519, et seq., contains many vague and subjective standards which do not provide adequate guidelines to channel the decision-making process. Subjective decision-making was the flaw that brought on *Furman v. Georgia,* supra, and the overturning of Nebraska's prior death statutes. The present statutes contain no indication of legislative intent or definitions relative to the numerous terms set forth

above. As such, the statutes cannot withstand constitutional scrutiny.

B. The Nebraska capital sentencing procedure violates the Eighth and Fourteenth Amendments of the United States Constitution because it limits the mitigating factors which may be considered by the sentencing body.

This problem was faced by this Court in *Lockett v. Ohio,* 438 U.S. 586 (1978) and *Bell v. Ohio,* 438 U.S. 637 (1978), wherein the Court held that as a constitutional requirement "the sentencer . . . not be precluded from considering as a mitigating factor any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death". *Lockett, supra* at 604. The court recognized that there could be "no perfect procedure for deciding . . .to impose death" but held that when the choice is between life and death, it is incompatible with the Eighth and Fourteenth Amendments to limit any independent mitigating factors pertaining to the defendant's character, record, and circumstances of the offense.

The Ohio statute considered by the court in *Lockett* is in many respects similar to the legislation in Nebraska. The mitigating factors in the Ohio statutes are three in number, Ohio Rev. Code Ann. Sec. 2929.03, and are similar to four of the seven mitigating factors set forth in the Nebraska law, specifically 29-2523 (2) (b) (c) (f) (g). Nebraska statutorily sets forth the additional factors of prior criminal activity, age and participation. 29-2523 (2) (a) (d) (f). The Ohio Supreme Court had considered the Ohio law in light of *Proffitt v. Florida,* 428 U.S. 242 (1976) and had held that the statute should be "liberally construed in favor of the accused". *State v. Bell,* 48 Ohio St. 2d 270, 281, 358 N.E. 2d 556, 564

(1976). The court specifically found that age and prior criminal record should be considered in determining mitigating circumstances. *State v. Bell,* supra at 281. The statutory scheme, therefore, as construed by the Supreme Court of Ohio was similar to Nebraska's.

Both the Ohio and Nebraska schemes preclude consideration of relevant factors and a liberal construction by the state court cannot cure this defect. The "mandatory standards" set forth in the Nebraska law limit this consideration and are, therefore, unconstitutional under the Eighth and Fourteenth Amendments of the United States.

C. The statutory procedures governing the imposition of a sentence in a capital case violate the Eighth and Fourteenth Amendments of the United States Constitution in that they are vague, overbroad, confusing and not guided by any ascertainable rules or standards to assure fairness, uniformity and meaningful review.

One of the fundamental concerns of this Court in reviewing the death penalty has been to determine whether the procedure utilized by the states creates some degree of fairness and predictability. The Nebraska statutes do not.

First, Section 29-2520 gives the trial judge several options as to the composition of the sentencing authority. He may make the sentence determination himself, with two other appointed judges, or remove himself. However, nothing in the statute provides any standards to control the judge's decision on this question. This decision is within the uncontrolled discretion of the trial judge. Presumably a trial judge's personal opinion on the death penalty could affect his decision on whether to ask for the aid of two other judges. Numerous other unreview-

able factors could also affect his decision. There is no way to determine why some of the current prisoners on death row such as Rust, Holtan, and petitioner were sentenced by a panel of three judges while others such as Stewart and Simants were sentenced by the trial judge. Is the difference to be found in the type of crime, the race of the defendant, the personal opinion and religious beliefs of the trial court? Because there are no standards these questions can never be answered or reviewed.

Second, the procedure is constitutionally defective because it contains no legislative guidance in the situation where the three judge panel is invoked. What vote from the panel is necessary to impose death? Was defendant Rust sentenced by a majority vote and defendant Holtan by a unanimous vote, or vice versa? If so, why the different treatment for a class of citizens similarly situated? Can the sentencing judge, if unsatisfied with the opinions of the two judges appointed by the Supreme Court, disband the panel and impose sentence himself? This has occurred under the current procedure and there is no statutory guidance controlling such decisions. Assuming that a majority rules, and the statute is silent on this point, there is a serious potential for unfairness here because similarly situated defendants may be treated differently, in violation of the equal protection guarantee of the Fourteenth Amendment. A person in Scottsbluff, Nebraska may be sentenced by a single judge, while a person in Omaha, Nebraska may be sentenced by a panel of three judges. In the case of the three judge panel, assuming the majority rules, at least two judges must vote for the death sentence. The Omaha defendant would then have a better chance to live than the Scottsbluff defendant, since only one vote would be necessary in Scottsbluff. Furthermore, assuming the three judges must have a unanimous decision, the defendant being sentenced by the panel would have

three chances to live, whereas the defendant facing a single judge would have only one.

Third, the statutes do not provide for review of that decision in this Court. As this Court pointed out in *Woodson, supra,* at 303, one of *Furman's* basic requirements was that all *actual* discretionary decisions be subject to judicial review. Since the decision to convene a three judge sentencing Court is not subject to such a review, it fails to meet *Furman's* basic requirements and is invalid. See *Woodson v. North Carolina,* 428 U. S. 280 (1976).

Clearly the procedure poses serious constitutional questions in that it lacks legislative guidance and standards to assure fairness, predictability and reviewability. This Court should grant the writ to review those questions.

II. The Nebraska Death Penalty Statutes violate the Sixth, Eighth and Fourteenth Amendments in that they fail to provide for meaningful appellate comparison of the selective imposition of the death penalty.

A. Comparative appellate review of the imposition of the death penalty is required by the Eighth and Fourteenth Amendments.

The purpose of statutory aggravating and mitigating circumstances standards is, of course, to place a control on sentencing discretion. More to the point, such standards tend to force life and death decisions into the open. The absence of such standards led this Court to strike down the North Carolina statute in *Woodson v. North Carolina, supra,* since the life or death decision in that state's mandatory scheme was merely pushed back to the simple verdict of guilty or not guilty.

It is clear, however, that standards by themselves are not sufficient. In *Gregg* and *Proffitt,* this

Court noted approvingly that the statutory schemes included appellate review of not only the lower court's application of the statutory standards, but also the statewide practice in their application. Surely, a statute which has no meaningful appellate comparative review cannot pass constitutional muster, since there seems little value in forcing a decision into the open if nobody exists to make certain that those very decisions are being reached uniformly. Petitioner contends that the Nebraska statutory scheme has no such meaningful appellate comparative review, and thus must fall.

B. The Nebraska statutes, as interpreted by the Nebraska Supreme Court, fail to provide adequate comparison of the sentencing treatment of all persons convicted of a homicide, thus resulting in a random, discriminatory imposition of the death penalty.

Sections 29-2521.01 to 2521.04, 29-2522, 29-2524, 29-2524.01, 29-2524.02, Nebraska Statutes, represent Nebraska's response to this Court's concern for proper appellate review. These provisions require the State Supreme Court to review and compare "all criminal homicides" § 29-2521.01 (5) which occurred after April 20, 1973 and determine that "no sentence imposed shall be greater than those imposed in other cases with the same or similar circumstances." To accomplish this review the legislature requires the Supreme Court to consider the following information from all criminal homicides:

"1. The facts including mitigating and aggravating circumstances.

2. The charges filed.

3. The crime for which the defendant was convicted.

4. The sentence imposed." Sec. 29-2521.01.

This review and comparison is required whether the defendant went to trial, whether he pled guilty, whether there was an appeal, whether the prosecutor reduced the charge, whether a single judge sentenced, or whether a panel of judges sentenced.

There is no legislative definition of "cases with the same or similar circumstances". However, the State Supreme Court, in reviewing and analyzing cases for comparison, is required to examine "the facts including *mitigating and aggravating circumstances*" (emphasis added). A comparison of cases pursuant to these Statutes does not contemplate some cursory "color-matching" of the details of the crime. Rather, the law is intended to eliminate disparity in result by requiring a review of the mitigating and aggravating circumstance in each case and a determination of whether the defendant's sentence is greater than those imposed in the other cases with the same or similar circumstances, and not the same or similar facts. "Circumstances" contemplates aggravating and mitigating circumstances.

The threshold problem in the appellate procedure is that it is not possible for the required information to be gathered because the legislature has not provided the necessary guidance, staff, and funding to accomplish the purposes of the law. In *Gregg,* this Court specifically noted that the Georgia legislature had made special provisions for a staff to enable the court to compile the data relevant to its considerations. *Gregg, supra* at 204. Without this aid the goals cannot be attained and a meaningful comparison cannot be accomplished.

The inability to gather the mandated information leads to a second and more basic problem—the information necessary to carry out a meaningful comparison has not been gathered. A thorough analysis of the information currently on hand has been made, and this analysis shows that the information collected is incomplete, inaccurate, fragmented, un-

indexed, and in a general state of disarray. Even the State of Nebraska has conceded that the information mandated by these Statutes is "not totally complete." See brief of appellee Page 30, Case 42204. *State v. Harold Lamont Otey.* Without these materials, there is no factual basis for a review and comparison pursuant to the above Statutes.

The crux of the problem is that the materials that the Supreme Court is required to examine do not exist. The Court is required to examine the mitigating and aggravating circumstances of every homicide since April 20, 1973 (§ 29-2519, et seq.). The records necessary to satisfy the legislative mandate do not exist now and never have existed. The typical situation that presents the problem is that in which the crime of First Degree Murder is committed by an individual, the prosecutor reduced the charge to Second Degree Murder in exchange for a guilty plea, and the defendant is sentenced. In that situation, the only records that exist are the transcript, containing the information, judgment, and sentence, the pre-sentence report, and possibly a record of the factual foundation for a plea to Second Degree Murder. In such a situation there are no transcripts of trial, no findings of fact except the factual foundation for the plea, no findings of aggravating or mitigating circumstances, and no means of determining the aggravating or mitigating circumstances unless the Court reviews police reports, leading to serious evidentiary problems. In such a situation, it is impossible for the defendant to have his case compared, and he is denied the protection of these Statutes.

The Nebraska Supreme Court realized the difficulty of performing such a comparative analysis given the dearth of existing data. In *State v. Williams,* Appendix B, the Court resolved this dilemma in a fashion which aptly illustrates the constitutional problems involved:

"There is language in at least two sections of L. B. 711, Laws of 1978, directing the Supreme Court to review and analyze "all criminal homicides." If the language be interpreted to extend beyond first degree murder convictions, problems relating to the exercise of prosecutorial discretion in homicide cases and the exercise by juries of the decisional power of determining guilt or innocence or fixing degrees of culpability in homicide cases are all involved. To interpret that language of L. B. 711 literally would create insurmountable constitutional problems. In view of the disposition made here, it is unnecessary to discuss constitutional issues.

For all these reasons, L. B. 711, Laws of 1978, codified as part of Chapter 29, article 25, R. S. Supp., 1978, will be construed to require the Supreme Court to review and analyze only cases involving a conviction for first degree murder committed on or after April 20, 1973." (205 Neb., at 75, 76).

Thus, although it is clear that the life or death decision will often be made by a jury or prosecutor in the sense that a lesser charge may be brought, or a lesser offense found, the facts and circumstances of those cases will never be used by the Nebraska Supreme Court to compare the death sentence imposed in the case before it. Yet, these very cases may involve facts and circumstances similar or even worse than those in which the defendant received the death sentence. It is the comparison of the facts and circumstances surrounding the crime which this Court has mandated. The Nebraska Supreme Court, by refusing to look at "all criminal homicides" as the Statute commands, has clearly violated the term and spirit of that mandate.

C. The Nebraska Procedure for Comparative Appellate Review denies petitioner the effective assistance of counsel in that it does not provide petitioner adequate information concerning facts and circumstances of other criminal homicides.

The Nebraska procedure is also constitutionally defective as currently applied, because it denies the petitioner his right to effective assistance of counsel. Without legislative guidance and ascertainable procedures, an attorney can only guess at the actual application of the law to his client. He is unable to argue the facts of other criminal homicides because that information is not available. What information has been gathered is incomplete, inaccurate and unindexed. The State Supreme Court has not revealed what procedures will be followed in view of the fact that the information required for the comparison is not available. While the comparison required by the above Statutes is the duty of the Supreme Court, it is imperative that the defendant, through his attorney, have an opportunity to brief and argue the application of the law to his case, both before the trial court and before the Supreme Court on appeal. Without legislative or judicial guidelines, this preparation is impossible without access to the materials compiled by the Supreme Court pursuant to the mandate of the legislature. The defendant is thus denied effective assistance of counsel at crucial stages of the proceedings against him.

III. Failure to grant Petitioner's Motion for a Continuance when the State endorsed forty-five (45) witnesses approximately one week before trial denied petitioner his Sixth Amendment rights to a fair trial and effective assistance of counsel.

A. As early as *Powell v. Alabama,* 287 U. S. 45 (1932), this Court recognized that appointment of counsel requires that counsel be appointed in such a fashion and under circumstances which enabled that counsel to render effective assistance. Without this requirement the rights established by *Gideon v. Wainwright,* 372 U. S. 335 (1963) would be hollow indeed.

A defendant can be denied effective assistance of counsel where counsel is appointed shortly before trial or otherwise has little time for preparation. While courts vary as to whether or not such tardy appointment creates a presumption of ineffective assistance, all agree that where such lack of preparation prejudiced the accused, his constitutional right to counsel has been violated. See *Calloway v. Powell,* 393 F. 2d 886 (5th Cir. 1968); *Bently v. Florida,* 285 F. Supp. 494 (S. D. Fla. 1968); *Coles v. Peyton,* 389 F. 2d 224 (4th Cir. 1968). Such is the case here.

Petitioner requested appointed counsel upon his initial appearance for a preliminary hearing on January 31, 1978.

Counsel was appointed on that date, and again on February 9, 1978. On March 23, 1978 the State endorsed forty-five (45) witnesses for trial. On March 31, 1978, Petitioner's counsel, the public defender, filed a motion seeking a continuance in order to properly prepare a defense, including interviewing the state's witnesses. This motion was denied and trial began April 6, 1978.

From this it appears clear that petitioner's Sixth Amendment rights to effective assistance of counsel were violated, since his counsel was unable, prior to trial, to even interview most of the state's witnesses.

The Nebraska Supreme Court recognized the problems created by the state's late endorsement of such a large number of witnesses (Exhibit A, p. 93), but merely said such conduct is " . . . a practice that should be avoided" at 93. Petitioner submits that

the prejudicial effect on denying appointed counsel time to adequately prepare petitioner's defense warrants much more than a slap on the state's wrist. This Court should take certiorari in order to cure this truly grievous constitutional error.

———o———

CONCLUSION

For all these reasons, petitioner respectfully urges this Court to grant his petition for a writ of certiorari to the Supreme Court of Nebraska.

Respectfully submitted,

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APPENDIX A (Otey)

STATE OF NEBRASKA,
Appellee,

vs.

HAROLD LAMONT OTEY,
Appellant.

— N. W. 2d —

Filed December 18, 1979. No. 42204.

1. **Continuances: Time.** A motion for a continuance is addressed to the sound discretion of the trial court, and an order denying a continuance will not be disturbed in the absence of a showing of a clear abuse of discretion.
2. **Continuances: Evidence.** Where the purpose of a continuance is to obtain the testimony of witnesses who are absent from the jurisdiction, a showing should be made that the witnesses can be located, that they will testify, and that their testimony would be relevant.
3. **Criminal Law: Indictments and Informations.** The indorsement of the names of additional witnesses upon the information just before trial is a practice that should be avoided.
4. **Jurors.** When the disqualification of a juror is not discovered until after the jury has been sworn, the juror should be excused and an alternate juror seated.
5. **Criminal Law: Evidence.** The State is entitled to prove any fact or circumstance which tends to establish any element of the crime, even though the fact or circumstance may prove or tend to prove another crime.
6. **Criminal Law: Statutes: Death Penalty: Constitutional Law.** The sentencing procedure provided by the Nebraska death penalty statute does not violate either the Nebraska or the federal Constituion.

7. **Criminal Law: Satutes: Sexual Sociopaths.** The purpose of the sexual sociopath law is to provide confinement with treatment for those persons subject to the law who are amenable to treatment and confinement without treatment for those subject to the law but not amenable to treatment.

8. **Criminal Law: Sexual Sociopaths: Death Penalty.** A determination as to whether a defendant is a sexual sociopath is of no importance where a death sentence has been imposed.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Affirmed.

S. J. Albracht of Lathrop, Albracht & Swenson, for appellant.

Paul L. Douglas, Attorney General, and Sharon M. Lindgren, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BOSLAUGH, J.

The defendant, Harold Lamont Otey, was convicted of first degree murder in the perpetration of a sexual assault in the first degree. He was sentenced to death and the case is here for review pursuant to section 29-2525, R. R. S. 1943. The assignments of error relate to the denial of a continuance requested by the defendant; the discharge of a juror by the trial court; the admission of evidence relating to a subsequent assault; and the imposition of the death penalty. The defendant also contends that he should have been declared a sexual sociopath and that the Nebraska death penalty statutes are unconstitutional. There is no contention that the evidence was not sufficient to support the finding of guilty beyond a reasonable doubt.

The murder was committed during the early morning hours of June 11, 1977, in Omaha, Nebraska. The defendant entered the apartment of the victim and took a stereo set which he placed behind a garage nearby. This stereo was later identified and traced back to the defendant.

The victim awakened when the defendant reentered the apartment. The defendant told the victim that he was going to rob her and that he would rape her. When she resisted he inflicted a knife wound across the top of her forehead. The defendant then sexually assaulted the victim. After the sexual assault the defendant and the victim went to the second floor of the apartment to get her money. There the defendant stabbed the victim a number of times inflicting deep wounds, struck her about the head with a hammer, and strangled her with a belt. The evidence shows that the victim died from the multiple wounds and strangulation inflicted upon her by the defendant.

The defendant was apprehended in Florida in January 1978. On January 28, 1978, he was interviewed there by two Omaha police officers and after proper warnings gave a voluntary statement which was a full confession. The statement was received in evidence and there is no contention here that the statement was not voluntary or should not have been received in evidence.

The information which was filed on February 1, 1978, listed only the name of a police officer at the time it was filed. The case was set for trial on April 5, 1978. On March 23, 1978, the county attorney notified the defendant that the State would ask leave to endorse the names of 44 additional witnesses upon the information. On March 31, 1978, the defendant moved for a continuance which was

denied on April 5, 1978. The motion alleged that additional time was required to prepare for trial because the defendant was undergoing psychiatric evaluation and defense counsel had been unable to locate certain possible defense witnesses. There was no showing made as to names of any witnesses, other than a Donald Lawrence, or as to what their testimony would be. The trial court offered to allow defense counsel to disclose in camera what the nature of the testimony might be, but the offer was not accepted.

A motion for a continuance is addressed to the sound discretion of the trial court, and an order denying a continuance will not be disturbed in the absence of a showing of a clear abuse of discretion. State v. Newton, 193 Neb. 129, 225 N. W. 2d 562. Where the purpose of a continuance is to obtain the testimony of witnesses who are absent from the jurisdiction, a showing should be made that the witnesses can be located, that they will testify, and that their testimony would be relevant. There was no showing made in support of the continuance requested in this case.

There is some indication from the argument on the motion that defense counsel was attempting to find evidence for a possible alibi defense, but counsel did not accept the trial court's offer to allow a showing to be made in camera. The defendant did not testify at the trial and no alibi evidence was produced. Also, there was no issue raised concerning the mental responsibility of the defendant.

The record does not show that the defendant was prejudiced by being brought to trial on April 6, 1978. The

information had been on file for more than 60 days and, in the absence of a showing of special facts or circumstances, there is no basis on which to conclude that the defendant did not have a reasonable time in which to prepare for trial.

The indorsement of the names of additional witnesses just before trial is a practice that should be avoided. Here the defendant was given less than one week's notice before the trial commenced. However, the record shows that these were prosecution witnesses, most of whose names appeared in the police reports that had been furnished to the defendant or they are otherwise identified in the record. There is no claim of surprise and no showing of actual prejudice because of the late indorsement of names. Under the circumstances in this case, it was not an abuse of discretion to refuse a continuance on that ground. We conclude that the record fails to show an abuse of discretion in denying a continuance to the defendant.

After the jury had been sworn, but before the trial had commenced, one of the jurors approached the trial court and stated that he could not be a fair and impartial juror because the defendant, if convicted, might be sentenced to death. With the defendant present the trial court informed both counsel and offered to allow them to question the juror. After both counsel declined, the trial court questioned the juror in their presence and ascertained that the juror could not be fair and impartial. The juror was then excused and an alternate seated. The defendant moved for a mistrial on the ground that the jury selection was tainted. Further examination of the juror by both counsel disclosed that the juror had not discussed

his feelings concerning the death penalty with other members of the jury. The motion for a mistrial was overruled.

The procedure which was followed in this case was proper. The disqualification did not become known until the juror approached the trial court and stated that, after considering the matter overnight, he was unable to be a fair and impartial juror. The juror was then examined in the presence of the defendant and counsel and the fact of disqualification established. An alternate was seated by the procedure provided by statute. There was no reason to declare a mistrial. Banks v. United States, 204 F. 2d 666 (8th Cir., 1953).

Prior to trial the defendant filed a motion in limine to exclude from the trial any evidence relating to an assault by the defendant upon another woman on July 14, 1977. The motion was overruled and evidence relating to the July 14 assault was received at the trial.

The evidence shows that on July 14, 1977, the defendant accosted the victim as she was about to enter her home. The defendant placed his hand over her mouth and held a knife at her throat and started to pull her into a garage. When she screamed the defendant ran away. The defendant was driving an automobile owned by Randall J. Harris, which was stopped at a police roadblock shortly after the incident. Although the defendant escaped, he left the knife which had been used in the assault in the seat of the automobile. The knife was identified as belonging to the defendant. When the defendant was questioned in Florida he acknowledged that the knife which had been left in the seat of the Harris car following the July 14 assault was the knife that had been used in the murder.

The evidence concerning the July 14 assault corroborated the defendant's statement and was admissible to show that the defendant had the murder weapon in his possession after the crime. It was admissible also to prove intent, motive, plan, identity, modus operandi, and absence of mistake or accident. The State is entitled to prove any fact or circumstance which tends to establish any element of the crime, even though the fact or circumstance may prove or tend to prove another crime. State v. Riley, 182 Neb. 300, 154 N. W. 2d 741.

After the verdict of guilty had been returned, the defendant moved to suspend further proceedings upon the grounds that sections 28-401 and 29-2519 et seq., R. R. S. 1943, were unconstitutional and that the defendant was a sexual sociopath. Both motions were overruled.

The Nebraska first degree murder statute and the procedural statutes relating to the determination as to whether a death sentence should be imposed were considered at length and held to be constitutional in State v. Simants, 197 Neb. 549, 250 N. W. 2d 881. That case is controlling here.

A determination as to whether a defendant is a sexual sociopath is of no importance where a death sentence has been imposed. The purpose of the sexual sociopath law is to provide confinement with treatment for those persons subject to the law who are amenable to treatment, and confinement without treatment for those subject to the law but not amendable to treatment. We have determined that sentencing is not to be delayed indefinitely where sexual sociopath proceedings have been instituted. State v. Shaw, 202 Neb. 766, 277 N. W. 2d 106. Since the death penalty

has been imposed up[illegible] the defendant in this case, none of his contentions concerning the sexual sociopath law require further consideration in this appeal.

A three-judge panel was convened as provided in section 29-2520, R. R. S. 1943, to determine what sentence should be imposed on the defendant. After an evidentiary hearing, the panel found that the murder was committed "to conceal the identity of the perpetrator of a crime" and that "the murder was especially heinous, atrocious, cruel, and manifested exceptional depravity by ordinary standards of morality and intelligence." The panel found specifically that this latter aggravating circumstance existed in its entirety and to a great degree in this case. The panel found that none of the mitigating circumstances set out in section 29-2523, R. R. S. 1943, existed. The panel concluded that sufficient aggravating circumstances existed to justify the imposition of the death penalty. The defendant was then sentenced to death. In its order of sentence the panel discussed the evidence at length and set forth in detail why the sentence imposed was a proper sentence in this case.

It was unnecessary to set out the evidence again in this opinion. Our review of the record has convinced us that the findings of the panel are fully supported and that there are no mitigating circumstances in this case to weigh against the imposition of a sentence of death. We find no error or abuse of discretion in the sentence imposed upon the defendant in this case.

We have made the review and analysis of similar cases required by section 29-2521.02 et seq., R. R. S. 1943, in accordance with the procedure and rules announced in

State v. Williams, *ante* p. —, — N. W. 2d —. We find the sentence of death imposed in this case is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

The judgment of the District Court is affirmed.

AFFIRMED.

KRIVOSHA, C. J., concurring in part, and in part dissenting.

For the reasons more particularly set out in my opinion concurring in part and dissenting in part in State v. Williams, *ante* p. —, — N. W. 2d —, I likewise concur in this case in all of the majority opinion save and except that part which affirmed the imposition of the death penalty. As in State v. Williams, *supra*, I would order the defendant confined to the Nebraska Penal and Correctional Complex for the balance of his natural life.

APPENDIX B (Williams)

STATE OF NEBRASKA,

Appellee,

vs.

ROBERT E. WILLIAMS,

Appellant.

— N. W. 2d —

Filed December 18, 1979. No. 42235.

1. **Criminal Law: Trial: Evidence.** Evidence which tends to show a course of conduct, scheme, or design is admissible to prove identity, although such evidence relates to other offenses.
2. **Criminal Law: Trial: Evidence: Intent.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
3. **Criminal Law: Trial: Evidence.** Evidence of other criminal acts which involve or explain the circumstances of the crime charged or are integral parts of an overall occurrence or transaction, may be admissible.
4. **Criminal Law: Trial: Evidence: Homicide.** If a photograph illustrates or makes clear some controverted issue in a homicide case, proper foundation having been laid, it may be received in evidence even if it is gruesome. The admission of photographs of a gruesome nature rests largely within the sound discretion of the trial court.
5. **Criminal Law: Trial: Evidence: Homicide: Intent.** In a homicide case, photographs of the victim, upon proper foundation, may be received in evidence for purposes of identification, to show the condition of the body, the nature and extent of the wounds and injuries, and to establish malice or intent.

6. **Criminal Law: Venue: Judgments.** A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court and its ruling will not be disturbed on appeal unless a clear abuse of discretion is shown.
7. **Criminal Law: Trial: Evidence: Confessions.** The admission in evidence of a statement or confession constitutes the trial court's independent determination that the statement was voluntarily made.
8. **Criminal Law: Trial: Judgments: Confessions.** A finding by the trial court that a statement of an accused is voluntary will not ordinarily be set aside on appeal unless the finding is clearly erroneous.
9. **Criminal Law: Trial: Discovery.** The mere possibility that an item of undisclosed information might have helped the defense or might have affected the outcome of the trial does not affect "materiality" in the constitutional sense.
10. ———: ———: ———. In a criminal case the trial court is vested with broad discretion in considering discovery requests of defense counsel and error can be predicated only upon an abuse of such discretion.
11. **Criminal Law: Juries: Instructions: Mental Health.** It is not error to refuse to instruct a jury in a criminal case on the consequences of a verdict of not guilty by reason of insanity.
12. **Criminal Law: Indictments and Informations: Evidence: Verdicts.** It is only where there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty.
13. **Criminal Law: Statutes: Sentences: Words and Phrases: Death Penalty.** In the context of Chapter 29, article 25, the word "sentence" in section 29-2521.03, R. S. Supp.,

1978, is construed to mean a sentence of death, and the provisions of that section directing the determination by the Supreme Court of the propriety of a "sentence" by comparison with previous cases are applicable only in a case where a sentence of death has been imposed.

14. **Criminal Law: Statutes: Supreme Court: Homicide: Time.** Under L. B. 711, Laws of 1978, codified as part of Chapter 29, article 25, R. S. Supp., 1978, the Supreme Court will review and analyze only cases involving a conviction for first degree murder committed on or after April 20, 1973.

15. **Criminal Law: Death Penalty: Supreme Court: Homicide.** Where a death sentence has been imposed, and the Supreme Court is required to determine the propriety of that sentence in such case, the determination of which previous first degree murder cases involve the same or similar circumstances and are therefore comparable will be made by this court on a case-by-case basis.

Appeal from the District Court for Lancaster County: Herbert A. Ronin, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, Thomas L. Hagel, and Richard L. Goos, for appellant.

Paul L. Douglas, Attorney General, and Judy K. Hoffman, for appellee.

Heard before Krivosha, C. J. Boslaugh, McCown, Clinton, Brodkey, and White, JJ., and Rist. District Judge.

McCown, J.

Robert E. Williams pleaded not guilty by reason of insanity or mental derangement to two counts of murder in the first degree and one count of first degree sexual assault. He was found guilty by a jury on all three counts and sentenced to death on each of the two murder

counts and to imprisonment for not less than 8 1/3 years nor more than 25 years on the sexual assault count.

In the late afternoon of August 11, 1977, the bodies of Patricia A. McGarry and Catherine M. Brooks were found in the McGarry apartment in Lincoln, Nebraska, after a search was instituted when neighbors found the 5-year-old daughter of Catherine Brooks wandering in the neighborhood looking for her mother.

The naked body of Catherine Brooks was found lying face down in the center of the living room floor. A pool of blood surrounded her head. There was a nonfatal bullet wound in her back and two bullet wounds behind her left ear. Later medical examination revealed spermatozoa in the vagina and in the rectal tract. The pathologist testified that the spermatozoa would have had to be deposited within an hour of her death.

The body of Patricia McGarry was lying in the dining room, face up, clad in a blue housecoat. She had also been shot three times, once under her right ear and twice in the neck. There was a bloody trail on the carpet from the living room into the dining room to the spot where Patricia's body lay.

The police found an empty beer bottle with latent fingerprints on a chair. Later examination established the fingerprints as those of the defendant. The police also found a full box of .22 caliber long rifle shells on the coffee table in the living room and another unfired .22 caliber shell on the sofa. The casing of a .22 caliber shell was found on the floor of the living room. There was a bullet hole in the wall between the living and dining rooms, and a spent bullet was found in the entryway

between the two rooms. Later investigation established that on August 10, 1977, at approximately 7:15 p.m., a model K-22 Smith & Wesson .22 caliber revolver and five boxes of .22 caliber long rifle shells were purchased by the defendant at a store in Lincoln.

Evidence at trial established that on August 11, 1977, at approximately 9:30 a.m., the defendant appeared at the apartment of another young woman in Lincoln, Nebraska. She had been acquainted with the defendant for approximately 6 months and he had been a babysitter for her 2-year-old daughter on occasion. The defendant told the woman that his car was broken down and asked to use her telephone. She admitted him and he then told her he needed to stay in her apartment for a while. She suggested that he stay in the storage room area of the apartment complex instead. The defendant then drew a revolver and demanded that she have sexual relations with him. She tried to lock herself in the bathroom but the defendant forced the door open and broke off the lock. He struck her in the chest and on the side of the head with the gun and threatened to blow her head off, and then raped her. The defendant remained in the apartment for several hours and raped the woman repeatedly.

At approximately 4 p.m., the defendant ordered the woman to bring her 2-year-old child and go to his car with him. As they approached the curb he told her she was free to go. She immediately went to a neighbor's home and called the police.

The woman testified that during the time the defendant had been with her, he drank one beer and smoked a joint of marijuana but appeared normal and did not

appear to be intoxicated. Other witnesses who had been with the defendant on August 10, and one as late as 1:30 a.m., on August 11, 1977, testified that on those occasions the defendant appeared normal in speech and actions and did not appear to be intoxicated, although he had been drinking.

The evidence at trial established that defendant left the woman's apartment in Lincoln about 4 p.m., August 11, 1977, and about an hour later was seen at a service station in Fremont, Nebraska, some 50 miles away, where he stopped and purchased gasoline. The station attendant testified that the defendant's speech and coordination appeared to be normal, although he smelled alcohol on the defendant's breath.

At approximately 10:15 p.m., on August 11, 1977, a deputy sheriff observed and checked the defendant's car at a park and rest area in Cherokee County, Iowa, and checked it periodically thereafter through the night. At 6:15 a.m., the deputy had the car towed away. Upon examination of the car, the deputies discovered a packaging box for a Smith & Wesson K-22 revolver; a box of .22 caliber long rifle cartridges from which six cartridges had been removed; a bag of marijuana; and some gas cans with negroid hairs on them.

Shortly after 6 a.m., on August 12, 1977, Mrs. Jack Montgomery, who lived 1½ miles west of the park and rest area in which defendant's car had been found, discovered that her car was missing from the garage. There was a blanket in the car and another blanket was also missing. She also found a checkbook with the name of the defendant imprinted on the checks lying in the drive-

way in front of the garage. At approximately 10 o'clock the same morning the Montgomery car was found abandoned in a ditch about 20 miles northeast of the Montgomery farm.

A little after 7 a.m., on the same morning, Elbert Bredvick was standing in his farmyard approximately 5 miles southwest of the point at which the Montgomery car had been abandoned. Bredvick observed the defendant approaching carrying two blankets draped over his shoulder. The defendant asked for directions to the nearest town. Bredvick gave the defendant directions which led defendant past the Wayne Rowe farmhouse one-half mile to the west, and the defendant departed in that direction.

On the morning of August 12, 1977, Mrs. Wayne Rowe left the farm home at 7:45 a.m., for an appointment at her hairdresser. Wayne Rowe left the house about 8:15 a.m., and returned shortly after noon, expecting his wife to be home. He observed that his wife's car was gone and when he entered the house he saw his wife's purse on the chair and the morning mail on the table. About that time an Iowa state trooper arrived and Rowe and the trooper went upstairs and found Mrs. Rowe's naked body on the bed. There was a shotgun wound in her side and another in her back, and there was a wound in her neck from a .22 caliber bullet. Later examination established that she had also been sexually assaulted.

Negroid hairs were found in her hand and on the bedspread which compared favorably in diameter, coloration, pigment distribution, scale patterns, and medullation to samples taken from the defendant and the hairs

found on the gas cans in his car. A .22 caliber bullet was found in the fibers of the bedspread which matched the bullets recovered from the bodies of Catherine Brooks and Patricia McGarry. A shotgun which had been kept in the Rowe home was missing and the telephone line had been cut.

In the bushes behind the Rowe garage officers found the blankets which were identified by Bredvick as the blankets that had been draped over the defendant's shoulder earlier that morning. The Rowe car was found later in St. Paul, Minnesota. Inside the car was a live round of .22 caliber ammunition and a misfired cartridge with a firing pin impression which matched a casing found at the murder scene.

On August 13, 1977, at approximately 1:30 p.m., in a suburb of St. Paul, Minnesota, the defendant confronted Walter Behun at gunpoint in the Behun yard and ordered Behun to drive him to St. Paul. They drove around for some time, ending at a railroad freight yard, where the defendant tied Behun up with belts and a sweat shirt, gagged him, and left him in a caboose. Behun testified that the defendant did not appear to be intoxicated.

About 3 p.m., on August 13, 1977, a young woman was returning to her car in a parking lot in St. Paul, Minnesota. She opened the car door and placed her purchase on the floor. The defendant came up behind her and ordered her to get into the car or he would shoot her. Before she had time to do so, he shot her once in the arm and again later behind her left ear. The defendant pushed her into the car, demanded the keys, and drove to a remote country area where he raped her. After the

assault, the defendant tied her hands and legs and drove off in her car. She managed to untie herself, got to a farmhouse and was taken to the hospital, where she ultimately recovered.

The evidence indicates that after August 13, 1977, the defendant went to Chicago, Illinois, and then back to Lincoln, Nebraska, where he was arrested in the railroad yards on the early morning of August 18, 1977.

The defendant made a statement to the police which was admitted in evidence, and also testified at trial. Essentially, the defendant admitted shooting both Catherine Brooks and Patricia McGarry at the apartment in Lincoln, but denied raping Catherine Brooks. He testified that he was heavily under the influence of drugs and liquor at the time of the shootings and that his recollection was consequently very vague and confused.

On the issue of insanity raised by the defendant's plea, two psychiatrists testified for the prosecution, and both testified that although the defendant suffered from a personality disorder, he was not insane at the time of the murders and assault. Two psychiatrists for the defense testified that at the time of the crimes the defendant suffered from a paranoid state beyond that of a personality disorder. One testified that the defendant's perception of reality and his judgment were seriously impaired, but the doctor could not say the defendant did not know that what he was doing was wrong. The other doctor testified that the defendant's thinking process was distorted and that he would know his actions were wrong only if he took time to think. At the conclusion of the trial the jury found the defendant guilty on all three counts. A three-judge panel sentenced him to death

on each of the two murder counts and to imprisonment for not less than 8 1/3 years nor more than 25 years on the sexual assault count, and this appeal followed.

The defendant contends that the trial court erred in admitting evidence of crimes other than those with which the defendant was charged, and that the evidence of such crimes was inadmissible and prejudicial. The defendant argues that none of the evidence of subsequent crimes was needed to prove any of the elements of the crimes charged, and that there is no legal connection between such subsequent crimes and the crimes with which the defendant was charged. He relies on the general rule that evidence of other crimes is not admissible to prove the defendant guilty of the particular crime with which he is charged. As an exception to that rule, this court has repeatedly held that evidence of other crimes similar to that charged is relevant and admissible when it tends to prove a particular criminal intent which is necessary to constitute the crime charged. State v. Casados, 188 Neb. 91, 195 N. W. 2d 210. In sexual assault cases evidence which tends to show a course of conduct, scheme, or design is admissible to prove identity, although such evidence relates to other offenses. State v. Walker, 200 Neb. 273, 263 N. W. 2d 454.

Section 27-404 (2), R. R. S. 1943, provides: "(2) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." See State v. Nielsen, 203 Neb. 847, 280 N. W. 2d 904.

Evidence of other crimes may be admitted in a criminal prosecution where the evidence is so related in time, place, and circumstances to the offense or offenses charged as to have substantial probative value in determining the guilt of the accused. Evidence which is not sufficiently related is excluded on the ground that the probative value is outweighed by the risk of undue prejudice. The question of probative value depends upon many considerations, including proximity in point of time and place, the character of the evidence, and all the surrounding circumstances. See Annotation, 92 A. L. R. 3d 545.

Sexual crimes have consistently been classified as a class of crimes in which evidence of other sexual crimes has been recognized as having independent relevancy. Recent cases recognize that the problem cannot generally be solved by virtue of a mechanical rule of relevancy but, instead, is one of balance. McCormick on Evidence (2d Ed.), § 190, p. 447, at p. 453, states: "[T]he problem is not merely one of pigeonholing, but one of balancing, on the one side, the actual need for the other-crimes evidence in the light of the issues and the other evidence available to the prosecution, the convincingness of the evidence that the other crimes were committed and that the accused was the actor, and the strength or weakness of the other-crimes evidence in supporting the issue, and on the other, the degree to which the jury will probably be roused by the evidence to over-mastering hostility."

The trial court noted that in this case the crimes charged must, of necessity, be proved by circumstantial evidence and inference because of the lack of an eyewit-

ness or a complete detailed statement of the defendant. The trial court's ruling on the defendant's motion in limine to exclude evidence of other crimes specifically stated: "The issue of mental competency bearing on the intent of the defendant in committing the alleged crimes, the marked similarity of design and motive of the other crimes and the closeness of the time period make the admissibility of the other crimes strongly relevant and overcome the prejudice and accumulation of evidence which results therefrom.

"The court further finds that the evidence of the various stolen automobiles is necessary to trace the course the defendant followed between the alleged other crimes which in the court's judicial discretion are admissible."

Evidence of other criminal acts which involve or explain the circumstances of the crime charged, or are integral parts of an overall occurrence or transaction, may be admissible. State v. Nielsen, *supra*. The evidence of other crimes in the case now before us constituted a continuous chain of evidence detailing the course of defendant's flight, and the patterned course of criminal conduct which was an integral part of it. The evidence of other crimes was relevant to prove motive, opportunity, and intent, and that relevance is greatly strengthened by the fact that all the other crimes occurred within a period of less than 72 hours after the crimes with which the defendant was charged. Not only was the evidence relevant on the issue of motive and intent, but it established plan, preparation, and a method of operation substantially similar, including the use of the same gun and the similar wounds in the neck and near the ear of the victims.

There was no abuse of discretion on the part of the trial court in admitting the evidence of other crimes here. The prejudicial effect on the defendant of the admission of the evidence of other crimes is clearly outweighed by the relevance of that evidence to prove the crimes with which the defendant was charged.

The defendant next contends that the photographs taken at the McGarry apartment in Lincoln and the Rowe farm in Iowa should not have been admitted because they were inflammatory, gruesome, and prejudicial, and that whatever relevance they may have had was outweighed by their prejudicial effect. We disagree.

Of the 22 photographs taken in Lincoln at the scene of the crimes charged, the majority of them were exterior and interior scenes showing only inanimate objects, and the defendant did not object to their admission. The defendant objected to the admission of seven photographs, only some of which might be said to be gruesome. Three of the photographs were of Catherine Brooks; one of the back of her head and showing a blood stain beneath it; the second was of her upper torso and back; and the third was a view of her entire body partially obstructed by a chair. Two photographs of Patricia McGarry as found at the scene were admitted into evidence; one of the upper torso showing the blood-stained carpet and book beneath her head; and the other of her entire clothed body. Two post mortem photographs of her, one a right view and the other a left view, were also admitted to show the location of wounds. Some cumulative photographs were not received into evidence and only three of the challenged seven photographs might reasonably be said to be gruesome.

The photographs of the Iowa crime scene are substantially similar in nature to those taken at the scene of the Nebraska crimes. The majority are exterior and interior scenes, showing only inanimate objects and are not gruesome. There were three photographs showing three different views of the victim's body. One showed the wound on her wrist, one showed the wounds on the left side of her head, and one showed the body as it was found, with the shotgun wound in the side. The three photographs showed the condition of the body and the nature and extent of the wounds. One additional photograph of the victim's body was excluded.

The admission of photographs of a gruesome nature rests largely within the sound discretion of the trial court, which must determine their relevancy and weigh their probative value against their possible prejudicial effect. State v. Freeman, 201 Neb. 382, 267 N. W. 2d 544. Although it is true that the probative value of gruesome photographs should be weighed against the possible prejudicial effect before they are admitted, if a photograph illustrates or makes clear some controverted issue in a homicide case, a proper foundation having been laid, it may be received, even if it is gruesome. State v. Partee, 199 Neb. 305, 258 N. W. 2d 634. In a homicide case, photographs of the victim, upon proper foundation, may be received in evidence for purposes of identification, to show the condition of the body, the nature and extent of wounds or injuries, and to establish malice or intent. State v. Dittrich, 191 Neb. 475, 215 N. W. 2d 637.

The photographs admitted here were relevant and of direct probative value in establishing the various elements

of the crimes charged. The court did not abuse its discretion in admitting the photographs into evidence.

The defendant next contends that the trial court erred in refusing to sustain a motion for a change of venue. The defendant contends that because of extensive publicity in the news media, virtually all the residents of Lancaster County had knowledge of the case, and many had formed opinions as to the guilt or innocence of the defendant. The defendant therefore argues that he could not receive a fair trial, nor could possible prejudice be cured by extensive voir dire examination.

The trial court held a hearing on the motion for change of venue prior to trial, at which time the results of an opinion survey conducted by two professional poll researchers and other evidence as to the nature and extent of pretrial publicity were introduced. The trial court reserved ruling on the motion pending the final selection of the jury. Extensive voir dire on jury selection extended over a period of 5 days, and the trial court then denied the defendant's motion for change of venue.

The record establishes that 11 of the 12 jurors recalled little about the publicity they had heard or read, and none had formed an opinion on the issue of the defendant's guilt. The twelfth juror at first indicated an opinion concerning some elements of the case, but also indicated confusion as to the voir dire questions and later responded that she did not have any opinion one way or the other. Upon questioning by the court she stated that she did not have a fixed opinion and that she could set aside any impressions she may have gotten from publicity and decide the case fairly on the evidence given

in the courtroom. All the jurors indicated that they believed they could be fair and impartial jurors.

The defendant takes the position that extensive pretrial exposure of jurors to information and news accounts as to the crimes with which the defendant was charged is sufficient, standing alone, to deprive him of due process. That conclusion is unfounded. Murphy v. Florida, 421 U. S. 794, 95 S. C. 2031, 44 L. Ed. 2d 589.

The burden of showing essential unfairness must be sustained by the one who claims such injustice and seeks to have the result set aside. As the United States Supreme Court stated in Irvin v. Dowd, 366 U. S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751: "To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."

In this state a motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court and its ruling will not be disturbed on appeal unless a clear abuse of discretion is shown. State v. Klatt, 187 Neb. 274, 188 N. W. 2d 821. While there was extensive pretrial publicity in the case now before us, we believe the record supports the action of the trial court in denying the motion for a change of venue and there was no abuse of discretion.

Defendant next contends that the trial court erred in failing to sustain defendant's motion to suppress all

statements, admissions, and comments obtained from the defendant by law enforcement officers. Essentially the argument centers upon the fact that the Miranda rights were not included on the tape recording of the defendant's statement, and the defendant testified that the Miranda rights were never read to him, and that he requested the presence of his attorney.

Two police officers specifically testified that the Miranda rights were read the defendant prior to the statement, that he responded affirmatively to each of them, and that the defendant did not request a lawyer and consented to give the statement at that time. The defendant's argument is that because the giving of the Miranda rights was not included on the tape recording, the absence from the recording is conclusive evidence that the rights were not given. Two police officers not only testified affirmatively that the Miranda rights were given, but explained why the tape recorder had not been turned on at the outset of the interrogation.

In this state the admission in evidence of a statement or confession constitutes the trial court's independent determination that the statement was voluntarily made. State v. Davis, 180 Neb. 830, 146 N. W. 2d 220, cert. den., 386 U. S. 998, 87 S. Ct. 1320, 18 L. Ed. 2d 348. A finding by the trial court that a statement of an accused is voluntary will not ordinarily be set aside on appeal unless the finding is clearly erroneous. State v. Medina, 189 Neb. 765, 204 N. W. 2d 785. The trial court's finding of voluntariness is supported by the record and is not erroneous.

The defendant asserts that he was denied a fair trial and due process of law because of the State's prejudicial

misconduct in withholding evidence favorable to the defendant in direct violation of the trial court's order concerning discovery and disclosure. In response to defendant's pretrial motions for disclosure and discovery, the trial court ordered the State to provide to the defendant for inspection and copying or photographing: (1) The defendant's statement; (2) the defendant's prior criminal record, if any; (3) the names and addresses of all witnesses on whose evidence the charge is based, including any witnesses which the prosecution intends to use in rebuttal; (4) the results and reports of physical and mental examinations, and of scientific tests or experiments made in connection with this particular case; and (5) documents, papers, books, accounts, letters, photographs, objects, or other tangible things of whatsoever kind or nature which could be used as evidence by the State.

Defendant complains of violations which involve documents under paragraph 5 of the order and center around 18 police investigative reports which contained, in many instances, summaries of statements of witnesses as well as inferences or conclusions of officers as to the validity and veracity of portions or all of the witnesses' statements. The defendant asserts that if the testimony of a witness at trial differed in any respect from the statement as reported in the police report, the State should have delivered the police report to the defendant prior to trial. Such a conclusion is wholly unwarranted. At the hearing on defendant's motion for new trial, the alleged violation of the discovery order was raised and evidence introduced, and the trial court, on this issue, specifically found: "Nothing in the exhibits appears to

be materially at odds with the testimony given at the trial. Those who testified were subjected to cross-examination at length by defendant's counsel or were called as witnesses for the defendant. No showing is made that information in the police reports could have been used to impeach any witness." The record fully supports that conclusion, and also establishes without serious question that the information in the police reports was not exculpatory or a mitigation of the degree of the offenses which would have been required to have been disclosed by the prosecution.

The defendant's position is that if a defendant has made a general motion for discovery and disclosure which has been granted in the sense that it covers documents of whatsoever kind or nature which could be used as evidence by the State, the State is required to produce for the defendant anything which might aid in his defense. We can find no support for such a contention. In Moore v. Illinois, 408 U. S. 786, 92 S. Ct. 2562, 33 L. Ed. 2d 706, the United States Supreme Court said: "We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." In a similar vein, this court said: "We have not yet reached the point in this state where the county attorney is required to give his entire work product to the defense." State v. Williams, 183 Neb. 257, 159 N. W. 2d 549.

In United States v. Agurs, 427 U. S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342, the United States Supreme Court said: "The mere possibility that an item of undisclosed information might have helped the defense, or might have

affected the outcime of the trial, does not establish 'materiality' in the constitution sense."

In State v. Isley, 195 Neb. 539, 239 N. W. 2d 262, this court said: "In a criminal case, the trial court is vested with broad discretion in considering discovery requests of defense counsel and error can be predicated only upon an abuse of such discretion." There was no abuse of discretion here.

The defendant assigns as error the trial court's refusal to instruct the jury with regard to the consequences of an acquittal by reason of insanity. The recent case of State v. Reitenbaugh, *ante* p. 583, 284 N. W. 2d 19, has determined the issue adversely to the defendant. In that case we held: "It is not error to refuse to instruct a jury in a criminal case of the consequences of a verdict of not guilty by reason of insanity."

Defendant also assigns as error the trial court's failure to dismiss or to direct a verdict in favor of the defendant as to the first degree sexual assault count. For almost a century it has been the rule in this state that: "It is only where there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty." State v. Webb, 197 Neb. 662, 250 N. W. 2d 625.

While the evidence in this case may be entirely circumstantial as to the sexual assault charge, there can be no real doubt that it was more than sufficient to go to

the jury ,and the trial court did not err in overruling the motion for directed verdict.

Finally, the defendant contends that the sentence of death is excessive relative to the facts of the case under the applicable statutory considerations.

Following the introduction of evidence at a sentencing hearing, the three-judge panel specifically found that the following aggravating circumstances were present: (1) That defendant had been previously convicted of another crime involving the use of threat or violence to the person, and had a substantial history of serious assaultive criminal activity; (2) that the murder of Catherine M. Brooks was committed in an apparent effort to conceal the identity of the perpetrator of a crime, but that the murder of Patricia McGarry was not; (3) that both murders were especially heinous, atrocious, cruel, and manifested exceptional depravity by ordinary standards of morality and intelligence and totally without any regard for human life; and (4) that at the time the murder was committed the defendant also committed another murder.

The sentencing panel found as the single mitigating circumstance that the defendant possesses an antisocial personality which, with his intoxication from the use of alcohol and drugs and emotional disturbance at the time he committed the murders, did, in some manner, diminish the defendant's capability to conform his conduct to the requirements of the law, but not to such an extent as to excuse him for the legal consequences of his conduct in the commission of the crimes.

The sentencing panel further found that the aggravating circumstances outweighed any mitigating circumstances. The panel then imposed the death penalty on each count of first degree murder.

The procedures of the sentencing panel complied fully with the statutory standards and specific procedures applicable to trial courts in cases of conviction for murder in the first degree. Chap. 29, art. 25, R. R. S. 1943, and R. S. Supp., 1978.

Chapter 29, article 25, includes the provisions contained in L. B. 711, Laws of 1978, now codified as section 29-2521.01 et seq., R. S. Supp., 1978, which apply primarily to the method of imposition of death sentences in the trial court and review of such sentences by the Supreme Court. The expressed purpose of L. B. 711 is to apply scrupulous standards of fairness to the imposition of the death penalty to insure that the death penalty should be applied uniformly and not arbitrarily.

Sections 29-2521.02 and 29-2521.03, R. S. Supp., 1978, provide that the Supreme Court shall, within a reasonable time after July 22, 1978, review and analyze all cases involving criminal homicide committed on or after April 20, 1973, and that the Supreme Court, upon appeal, shall determine the propriety of the sentence in each case involving a criminal homicide "by comparing such case with previous cases involving the same or similar circumstances. No sentence imposed shall be greater than those imposed in other cases with the same or similar circumstances." In the context of Chapter 29, article 25, the word "sentence" in section 29-2521.03, R. S. Supp., 1978, is construed to mean a sentence of death, and the provi-

sions of that section directing the determination by the Supreme Court of the propriety of a "sentence" by comparison with previous cases are applicable only in a case where a sentence of death has been imposed.

A primary foundation, basic to the review of the statutory provisions referred to, is the fact that in this state first degree murder is the only crime for which the penalty of death can be imposed. The provisions of Chapter 29, article 25, dealing with sentencing, apply only to a conviction for first degree murder under section 28-303, R. S. Supp., 1978. §§ 29-2519 and 29-2520, R. S. Supp., 1978. The Nebraska act, L. B. 711, Laws of 1978, was patterned after the Georgia act which requires the Georgia Supreme Court to review death sentences and determine: "Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." § 27-2537, Georgia Code. That identical language appears in section 29-2522 (3), R. S. Supp., 1978, which applies primarily to initial sentencing in the trial court. The Georgia Supreme Court has restricted its review and comparison of "similar" cases to cases involving crimes for which the death penalty is permissible. It should be noted also that in Georgia the death penalty is permissible for more than one specific crime. The review and comparison by the court has been restricted to cases involving the identical crime—felony murder against felony murder, rape against rape. Coley v. State, 231 Ga. 829, 204 S. E. 2d 612. The Georgia cases reflect the obvious fact that it is a practical impossibility to make any meaningful comparison of a death sentence in a first degree murder case with any sentence imposed for another crime for which the death sentence is not authorized.

There is language in at least two sections of L. B. 711, Laws of 1978, directing the Supreme Court to review and analyze "all criminal homicides." If the language be interpreted to extend beyond first degree murder convictions, problems relating to the exercise of prosecutorial discretion in homicide cases and the exercise by juries of the decisional power of determining guilt or innocence or fixing degrees of culpability in homicide cases are all involved. To interpret that language of L. B. 711 literally would create insurmountable constitutional problems. In view of the disposition made here, it is unnecessary to discuss constitutional issues.

For all these reasons L. B. 711, Laws of 1978, codified as part of Chapter 29, article 25, R. S. Supp., 1978, will be construed to require the Supreme Court to review and analyze only cases involving a conviction for first degree murder committed on or after April 20, 1973. Where a death sentence has been imposed, and this court is required to determine the propriety of that sentence in such case, the determination of which previous first degree murder cases involve the same or similar circumstances and are therefore comparable will be made by this court on a case-by-case basis.

Our review and analysis includes first degree murder convictions for offenses committed on or after April 20, 1973, including cases presently pending in this court on appeal. Thirty-two cases are included in that review in addition to the case now before us. Twenty-one cases have been before this court previously on appeal. Eight cases were not appealed. Three additional cases are now pending in this court on direct appeal. Seven death sentences are now pending including the case now before us.

The remaining twenty-five cases involve life sentences. The cases reviewed and analyzed are set out in the addendum to this opinion.

Analysis of all these cases indicates that a callous, coldblooded, and cruel disregard for human life, coupled with convictions for previous crimes involving violence to the person, has tended to be given great balancing weight as aggravating circumstances, and that extreme youth, coupled with the absence of any substantial record of previous criminal conduct, has tended to be given great balancing weight as mitigating circumstances. In all the death penalty cases previously affirmed or now pending in this court, each has involved at least three separate and distinct statutory aggravating factors and only one or no statutory mitigating factors. The case now before us also fits that pattern, and, in addition, is the only death sentence case now pending which involves multiple first degree murders.

It would be virtually impossible to find two murder cases which are the same in all respects. We find no case in which a life sentence was given which involves the same or similar circumstances to that of the case at bar. Any objective weighing and balancing of aggravating and mitigating circumstances and comparison to the other death penalty cases now pending establishes that the death sentence in the case now before us is not excessive or disproportionate to the death penalties imposed in the other death penalty cases. If sufficient aggravating circumstances existed in those cases to justify the imposition of the death penalty, then the merciless, callous murder of two defenseless women in this case provided ample justification for the death penalty here.

The defendant's remaining assignments of error are without merit, and the convictions and sentences are affirmed.

AFFIRMED.

ADDENDUM

First degree murder cases analyzed and reviewed as of November 1, 1979.

CASES APPEALED AND REPORTED

State v. Casper, 192 Neb. 120, 219 N. W. 2d 226.
State v. Wilson, 192 Neb. 435, 222 N. W. 2d 128.
State v. Nokes, 192 Neb. 844, 224 N. W. 2d 776.
State v. Russell, 194 Neb. 64, 230 N. W. 2d 196.
State v. Harris, 194 Neb. 74, 230 N. W. 2d 203.
State v. Lytle, 194 Neb. 353, 231 N. W. 2d 681.
State v. Ell, 196 Neb. 800, 246 N. W. 2d 594.
State v. Sims, 197 Neb. 1, 246 N. W. 2d 645.
State v. Stewart, 197 Neb. 497, 250 N. W. 2d 849.
*State v. Rust, 197 Neb. 528, 250 N. W. 2d 867.
*State v. Holtan, 197 Neb. 544, 250 N. W. 2d 876.
State v. Simants, 197 Neb. 549, 250 N. W. 2d 881.
State v. Record, 198 Neb. 530, 253 N. W. 2d 847.
*State v. Peery, 199 Neb. 656, 261 N. W. 2d 95.
State v. Beans, 199 Neb. 807, 261 N. W. 2d 749.
State v. Scott, 200 Neb. 265, 263 N. W. 2d 659.
State v. Simpson, 200 Neb. 823, 265 N. W. 2d 681.
State v. Prim, 201 Neb. 279, 267 N. W. 2d 193.
State v. Fuller, 203 Neb. 233, 278 N. W. 2d 756.
State v. Nielsen, 203 Neb. 847, 280 N. W. 2d 904.
State v. Bennett, 204 Neb. 28, 281 N. W. 2d 216.

CASES NOT APPEALED TO SUPREME COURT

State v. Jimmie Ray Anderson Sentence 7/26/73.	Douglas County-District Court Case No. 14931
State v. Kelvin Anderson Sentence 9/25/78.	Douglas County-District Court Doc. 102, p. 85
State v. Brown Sentence 3/25/74.	Douglas County-District Court Doc. 88, p. 625
State v. Floyd Sentence 5/16/78.	Hamilton County-District Court Doc. 24, p. 196
State v. Hatcher Sentence 4/14/78.	Douglas County-District Court Doc. 101, p. 321
State v. Marshall Sentence 3/13/78.	Lancaster County-District Court Doc. 48, p. 262
State v. Rowert Sentence 12/8/77.	Platte County-District Court Case No. 2805
State v. Schaeffer Sentence 9/30/77.	Hall County-District Court Doc. 28, p. 279.

CASES PENDING ON APPEAL IN SUPREME COURT NOVEMBER 1, 1979.

*No. 42204-State v. Otey Sentence 6/20/78	Douglas County-District Court Doc. 101, p. 489
*No. 42301-State v. Anderson Sentence 8/24/78	Douglas County-District Court Doc. 99, p. 392
*No. 42302-State v. Hochstein Sentence 8/24/78	Douglas County-District Court Doc. 99, p. 394.

*Death sentence pending.

KRIVOSHA, C. J., concurring in part and in part dissenting.

With all due respect to my brothers who make up the majority in this case, I must in part dissent from their decision in this case. I wholeheartedly concur in all the conclusions reached by the majority, including its analysis and interpretation of how we are to apply L.B. 711, Laws 1978, except as to its single conclusion that the death penalty should be imposed in this case. My review of those cases included in the majority's addendum compels me to reach a contrary conclusion. I would modify the judgment of the trial court by declaring that the defendant be sentenced to a term of life imprisonment rather than be sentenced to execution.

So that there be no confusion with regard to the matter, let me clearly and unequivocally state that my decision is not based upon any conviction that in no case should the death penalty be imposed. Quite to the contrary, I am of the mind that in an appropriate case under the law as it presently exists, the imposition of the death penalty would be both lawful and appropriate. It is just that I conclude in this case the law does not authorize the imposition of the death penalty.

I totally reject the contention made by some that the imposition of the death penalty is either immoral or unethical when imposed by a society pursuant to its criminal code and subject to the further requirement that the defendant be afforded due process of law. We find the imposition of capital punishment in an appropriate case provided for as early as the Mosaic Code and perhaps even before. I have difficulty concluding that that which is embodied in the Mosaic Code can be either unethical or immoral.

It is true that some societies, through the ages, have discriminated in the manner in which capital punishment has been administered or have imposed it in a barbaric manner. Neither of those actions can be condoned. But the mere fact that a society prescribes the imposition of

the death penalty in an appropriate case does not cause it to be either immoral or unethical.

I, likewise, reject the contention made by some that the imposition of the death penalty serves as a deterrent to future crime. The evidence with regard to that matter is either totally lacking or, if available, is so inconclusive that it is not reliable. Except in rare instances, the crime itself for which the penalty is imposed is of such a nature that few, if any, has given much thought to the ultimate consequences.

My rationale for recognizing the right of a society to impose capital punishment in an appropriate case is, rather, based upon a view that a civilized society has a right to assign to that crime or crimes, which it considers to be the most heinous, the most severe penalty it can inflict. That is to say, a society may declare in advance what crime or crimes it considers to be of the highest order and the worst offense to mankind by providing for a penalty which likewise is of the highest order and the most severe. In so doing, the society has clearly and unequivocally announced to its members that this crime for which the ultimate penalty is imposed is a crime separate and apart from all other crimes which can or may be committed within the society. It is an attempt by the people, through their legislative body, to issue a pronouncement with regard to the nature of the crime. It is on that basis that I find the Legislature of this state may appropriately ascribe, as an alternative penalty for the commission of the most heinous crime (first degree murder), the imposition of the death penalty. It should therefore be clear then that my disagreement with the major-

ity today is not based upon any notion that capital punishment is never appropriate.

My difficulty arises by reason of my analysis of the 32 cases reviewed by the majority in reaching its conclusion that the imposition of the death penalty in this case is appropriate. The majority notes that "in all the death penalty cases previously affirmed or now pending in this court, each has involved at least three separate and distinct statutory aggravating factors and only one or no statutory mitigating factors * * * any objective weighing and balancing of aggravating and mitigating circumstances and comparison to the other death penalty cases now pending, establishes that the death sentence in the case now before us is not excessive or disproportionate to the death penalties imposed in the other death penalty cases." With that statement I agree. But it is my belief that the fact that this case squares with the seven other cases in which the death penalty has been imposed does not answer the question. I am more concerned, as I believe L.B. 711, Laws 1978, requires me to be concerned, as to how this case squares with the remaining 25 cases where the death penalty was not imposed.

It was noted by this court in State v. Stewart, 197 Neb. 497, 250 N. W. 2d 849, "Following the issuance of the opinion of the United States Supreme Court in Furman v. Georgia, 408 U. S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), the Nebraska Legislature, in an effort to conform with the requirements for validity of death penalty statutes set forth in Furman, revised Nebraska's statute, and in 1973 enacted L.B. 268, R. R. S. 1943, which now appears as sections 29-2519 to 29-2546, R. R. S. 1943."

L.B. 268, Laws 1973, prescribed a series of aggravating circumstances and mitigating circumstances which were to be considered by the trial court in determining whether to impose the death penalty. We early concluded that the fact that there was a list of aggravating circumstances and a list of mitigating circumstances did not mean that one was to simply add up the aggravating circumstances and add up the mitigating circumstances and subtract one from the other.

Again, in State v. Stewart, *supra,* we said, "It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present. Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great.' "

We further went on in State v. Stewart, *supra,* to quote from the Florida decision of Alvord v. Florida, 322 So. 2d 533 (Fla., 1975): " 'There is no way that the Legislature could program a judicial computer with all of the possible aggravating factors and all of the possible mitigating factors in each case. See State v. Dixon, supra. The law does not require that capital punishment be imposed in every conviction in which a particular state of facts occur. The statute properly allows some discretion, but requires that this discretion be reasonable and controlled. No defendant can be sentenced to capital punishment unless the aggravating factors outweigh the mitigating factors. However, this does not mean that in every instance under a set state of facts the defendant must suffer capital punishment.' " It therefore seems quite clear from what we have heretofore said that while L. B. 268, Laws 1973, prescribed aggravating and mitigating circumstances, they were intended to serve as a guide and not as an absolute. Some latitude was still left with the courts as to when the death penalty was to be imposed. Were nothing more involved in this case than L. B. 268, Laws 1973, I might be able to agree with the majority. I must, however, continue my analysis of this case in light of the fact that after adopting L. B. 268, Laws 1973, our Legislature saw fit to adopt L. B. 711, Laws 1978. I must, therefore, presume that the Legislature intended L. B. 711, Laws 1978, to serve as either an addition to or a modification of L. B. 268, Laws 1973. Otherwise, there would have been little purpose or sense in adopting that second act. I believe that a reading of L. B. 711, Laws 1978, discloses that the Legislature intended to add to L. B. 268, Laws 1973.

Under the provisions of L. B. 711, Laws 1978, we are now not only required, before imposing the death sentence, to consider aggravating and mitigating circumstances but we are further required, under the provisions of section 29-2521.03, R. S. Supp., 1978, to "determine the propriety of the sentence in each case involving a criminal homicide by comparing such case with previous cases in-

volving the same or similar circumstances. No sentence imposed shall be greater than those imposed in other cases with the same or similar circumstances." What constitutes a "circumstance" is not spelled out. Likewise, L. B. 711, Laws 1978, imposes on the trial court in the first instance, and this court on appeal, a duty before ordering the death penalty to consider (1) whether sufficient aggravating circumstances exist to justify imposition of a sentence of death. (2) whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances, or (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Subsection (3) was added to L. B. 268, Laws 1973, by L. B. 711, Laws 1978. The Supreme Court is authorized to reduce any sentence it finds not to be consistent with sections 29-2521.01 to 29-2521.04, 29-2522, and 29-2524, R. S. Supp., 1978. All of that makes it seem clear to me that not only is this court required to examine aggravating and mitigating circumstances, but in addition to that we are supposed to in some manner place each first degree murder case one on top of the other to see whether or not they all conform. While I may be the first to concede that imposing such a duty upon the court is at best difficult and perhaps impossible, nevertheless, I cannot find how I can ignore that requirement. I do not by saying this suggest that the majority has ignored that requirement. They have reached a different conclusion by reason of making a significant distinction in the circumstances. For me, however, once the act of intentionally killing another is established, I find the other circumstances to be of less

significance and therefore the distinctions much more difficult to make. It is in this area where I differ with the majority. It is simply a fact that when I place the cases one on top of the other, I do not reach the same conclusion as reached by the majority. For me, factors such as the age of the defendant or the previous record of the defendant are not nearly as significant as the circumstances under which the murder was committed.

Of the remaining 25 cases where life sentences have been imposed in lieu of death, I find the following to be true. In State v. Nokes, 192 Neb. 844, 224 N. W. 2d 776, the defendant pleaded guilty to one count of first degree murder for the killing of Wilma Hoyt and one count of second degree murder for the killing of Edwin Hoyt. The facts disclosed that the defendant shot and killed the couple, dismembered their bodies with a butcher knife, wrapped the pieces, and placed them in a freezer. Later the frozen pieces were removed from the freezer and thrown into a lake. The defendant was given a life sentence.

In State v. Sims, 197 Neb. 1, 246 N. W. 2d 645, the defendant was convicted of first degree murder. The facts disclose that prior to the shooting the deceased had been driving his automobile. The defendant and the deceased were involved in a near accident which resulted in the defendant having words with the deceased. After a brief conversation the defendant returned to his automobile. A short time later the defendant returned to the area where the deceased was parked. A passenger in the defendant's automobile stepped out of the car and fired a pistol in the air. The defendant removed a shotgun from the car and walked rapidly in the direction of

the deceased who was standing against his car. The defendant stopped when he was about 10 feet away from the deceased and fired one shell which struck the deceased in the abdomen, causing his death. The defendant was sentenced to life imprisonment.

In State v. Stewart, 197 Neb. 497, 250 N. W. 2d 849, the evidence discloses that the defendant, though only 16 years of age, was engaged in the business of selling marijuana. He induced his suppliers to meet him so that he could "rip them off." The defendant, without provocation, shot the two dealers, hitting them in the back of the head, fatally shooting one who died instantaneously and wounding the other. The wounded one fell to the floor of the van and observed the defendant spreading gas in the van and igniting it in an effort to conceal the crime. The defendant was sentenced to life imprisonment.

In State v. Record, 198 Neb. 530, 253 N. W. 2d 847, the defendant and another were driving in an automobile when they decided to rob anyone who next came along. They drove to approximately 180th and Dodge Streets in Omaha and parked on a side road waiting for someone to drive by so that the defendant could shoot and rob someone. Approximately 3 a.m., a car driven by the victim passed their parked car, proceeding east on Dodge Street. With one of the parties driving, the victim's car was pursued. As the car drove alongside it as if to pass, the defendant fired a shot, breaking the glass and killing the driver. The defendant was sentenced to life imprisonment.

In State v. Scott, 200 Neb. 265, 263 N. W. 2d 659, the defendant was charged with murder in the perpetration

of or an attempt to perpetrate a robbery. The evidence discloses that the defendant entered the home of William and Bertha McCormic in Omaha and demanded money at gunpoint. A scuffle ensued and Mr. McCormic was shot twice and killed, and Mr. McCormic was shot twice and wounded. Mr. McCormic was 92 years of age at the time. Mrs. McCormic, age 83, had impaired vision and could not describe her assailant with any specificity. The defendant was sentenced to life imprisonment.

In State v. Prim, 201 Neb. 279, 267 N. W. 2d 193, the defendant was charged with first degree murder, having shot and killed the defenseless operator of a gas station during the commission of a robbery. He was sentenced to life imprisonment.

Likewise, there are eight additional cases included in the addendum in which a life sentence was imposed for first degree murder and not appealed to this court. In State v. Anderson the defendant, though admittedly only 15 years old, had three previous felonies. During the course of a robbery committed by jumping into the victim's automobile, the defendant shot the victim in the head. He was sentenced to life imprisonment.

In State v. Hatcher the defendant, being pursued by a police officer, engaged in a struggle with the police officer, and as the officer struggled with the defendant the officer's gun went off twice, the second time hitting the officer in the head. The defendant was sentenced to life imprisonment.

In State v. Brown the defendant killed his victim during a robbery. He was sentenced to life imprisonment.

In State v. Jimmie Ray Anderson, the 34-year-old defendant and his wife resisted arrest by a patrolman and in the struggle in the police car the patrolman was shot and killed. The defendant was sentenced to life imprisonment.

In State v. Schaeffer, the defendant, a 16-year-old, together with a friend, forced the owner of the Ace Hardware Store in Grand Island into their car at gunpoint where, after robbing him, they shot him 17 times. The defendant was sentenced to life imprisonment.

In State v. Floyd, the defendant, 37 years old, shot and killed an unarmed gas station attendant during the course of a robbery. He was sentenced to life imprisonment.

In State v. Rowert, the 23-year-old defendant who had been drinking robbed another who also was intoxicated and who had a substantial sum of money on his person. The defendant determined to kill the victim so that the defendant could not be identified. The defendant lured the victim out of a bar and drove him out into the country where he took the money and then slit the defendant's throat and then decapitated him. He was sentenced to life imprisonment.

In State v. Marshall the defendant, a 20-year-old working in a flower shop in Lincoln, robbed the owner and in the course of the robbery struck the owner in the head several times with a metal bar from which the victim died. He was sentenced to life imprisonment.

In each of the cases I have referred to where a life sentence has been imposed, one can find distinguishing factors, to be sure, and in that regard I cannot quarrel

with the majority in its conclusion. I'm simply unable to make such fine distinctions with regard to, on the one hand, the matter of killing and, on the other hand, the imposition of the death penalty. I have difficulty seeing how the killing of a defenseless, faceless victim driving an automobile is any less heinous than the case at bar. Once the facts establish the totally unnecessary, meaningless, and wasteful but deliberate, intentional killing of another, I have difficulty significantly distinguishing the circumstances under which the crime was committed. It is my view that the Legislature, in adopting L. B. 711, Laws 1978, must have intended to further restrict the impositon of the death penalty as previously provided for in L. B. 268, Laws 1973, by directing us not to impose the death penalty if on previous occasions of cruel and senseless killings we have not imposed the death penalty.

My conclusions herein legitimately pose two questions: (1) If the death penalty is not appropriate in this case, when will it be appropriate, and (2) has the adoption of L. B. 711, Laws 1978, placed us into such a mold that we may no longer impose the death penalty under any circumstances where a single person has been given a life sentence under similar circumstances. With regard to the first question, let me simply say that I believe I will recognize an appropriate case when I see it. I have no doubt that given that appropriate case, based upon all the things we have done in cases heretofore, I will be able to conclude that the imposition of the death penalty is intended even in light of L. B. 268, Laws 1973, and L. B. 711, Laws 1978, and I will be able to affirm the imposition of that penalty. Unfortunately, I cannot in advance articulate how or under what circumstances that may be.

With regard to the second question, whether we are now in such a mold from which it may be difficult, if not impossible, to get out, I can simply say that that is a matter which must appropriately be considered by the Legislature. Too often, courts are accused of intruding into the legislative arena. I chose not to do so. I believe the Legislature intended to limit situations in which the death penalty is imposed. If, in fact, the passage of L. B. 711, Laws 1978, has made the imposition of the death penalty difficult, if not impossible, then it is for the Legislature to reconsider its action.

Nothing I have said here should in any manner be misconstrued so as to permit one to conclude that I do not consider the commission of murder a heinous, appalling, and virtually unforgiving crime. Indeed I do. I hold no belief that one who commits such a crime is entitled to anything other than the most severe punishment. I am, however, constrained in my actions as a judge. On the one hand, I am obligated to impose a penalty required by law even in those instances where I may personally disagree. By the same token, I must likewise refrain from imposing a penalty where restrained by the law, even in those cases in which I may personally disagree. That is the situation in which I find myself in this case. The murder in this case was a terrible, horrible, unforgiving crime. Yet it is likewise, in my mind, no worse (if such comparison with regard to murder can be made) than the senseless and meaningless taking of lives for which we have heretofore imposed life sentences. It is for that reason that I would disagree with the majority in that one limited area, and I would modify the judgment herein to provide that the defendant should be confined in the Nebraska Penal and Correctional Complex for the remainder of his natural life.